STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7600

Investigation into 1) whether Entergy Nuclear Vermont Yankee LLC and Entergy Nuclear Operations, Inc. (collectively, Entergy VY) should be required to cease operations….

VPIRG MEMORANDUM ON SCOPE OF PREEMPTION

The Vermont Public Interest Research Group (VPIRG) hereby submits this memorandum in response to the memorandum submitted on May 18, 2010 by Entergy Nuclear Vermont Yankee (ENVY).

It is important to articulate what is and what is not at issue in the proceedings in Docket No. 7600. What is before the Board in this docket is the issue of the extent of the Board's authority to respond to the release of a radiological hazard, tritium, and possibly other materials, by Vermont Yankee through leaks in underground piping -- piping that that Vermont Yankee had previously testified did not exist. VPIRG does not take a position as to the extent of the Board's authority under the Supremacy Clause to respond to the unique facts that the Board now has before it in this docket. VPIRG stands on the legal analysis of preemption set forth in its July 16, 2009 Post-Hearing Memorandum of Law at pp.24-31, filed in Docket 7440.

However, VPIRG wishes to revisit an issue that its raised in its July 16, 2009 filing, long before the leaking pipes were known - the revocation option. If the Board did succeed in revoking ENVY and ENO's Certificate of Public Good (undoubtedly after court challenge), the state could be in a worse position. A presently unknown entity could assume operation of the facility or the facility could be owned (but not operated) by an entity without a Vermont CPG. ENVY and ENO's commitments not to raise preemption arguments as to certain of Vermont's

heightened decommissioning standards would be unenforceable against the new operator[1]. While the DPS and other parties can be expected to argue that these conditions protect Vermont's land use and economic interests, and therefore are not preempted, the decisions of the lower courts on these issues are mixed. See July 16, 2009 Brief at pp.24-31. This course may not be in Vermont's interest. Other sanctions, such as a monetary sanction or an order that power generation cease, would not raise these concerns.

What clearly are not before the Board in this docket are other, very important, preemption issues. The issues in this docket do not include the authority of the General Assembly of the State of Vermont to pass, or to refuse to pass, legislation authorizing Vermont Yankee to operate an electric generating station after March 21, 2012, pursuant to Acts 74 and 160 of the Laws of 2005 and 30 V.S.A. § 248. The issues in this docket do not include the authority of the Public Service Board to issue, or to decline to issue, a Certificate of Public Good to operate Vermont Yankee after March 21, 2012 under Acts 74 and 160 of the Laws of 2005 and 30 V.S.A. § 248. As to those proceedings, it is beyond reasonable dispute that the holding of Pacific Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 222-223, 103 S.Ct. 1713, 1732, 75 L.Ed.2d 752 (1983) continues to provide the governing standard:

> The Court of Appeals is right, however, that the promotion of nuclear power is not to be accomplished "at all costs." The elaborate licensing and safety provisions and **the continued preservation of state regulation in traditional areas** belie that. Moreover, Congress has allowed the States to determine-as a matter of economics-whether a nuclear plant vis-a-vis a fossil fuel plant should be built. The decision of California to exercise that authority does not, in itself,

[1] ENVY's Post-Hearing Brief challenged, on preemption grounds, numerous conditions proposed by the DPS and the WRC. However, it did not raise preemption arguments as to: decommissioning to "Greenfield" standards (Vanags PFT 2/11/09 p.9), a prohibition against rubblization (Vanags PFT 2/11/09 p.9-14), expeditious removal of spent fuel (Vanags PFT 2/11/09 p.15), and the 55/45 split of excess decommissioning funds upon certification that decommissioning is complete (Vanags PFT 2/11/09 p.16). A new operator may take a different view.

constitute a basis for preemption. Therefore, while the argument of petitioners and the United States has considerable force, **the legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons.**

8/20/10

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